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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

RAYMOND CLINTON HULLUM, JR.,
Petitioner

VS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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MEMBER: BAR OF U.S. SUPREME COURT

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TO THE COURT:

I. INTRODUCTION

Your Petitioner HULLUM (with Lentz and JOHNSTON) was indicted on four counts of wiretapping, conspiracy to wiretap and possession of wiretapping equipment. JOHNSTON plea bargained out of the case and on the trial of HULLUM and LENTZ, one count (Possession) was dismissed summarily. The jury found HULLUM (and LENTZ) guilty of the other three counts. The United States

made its election and the Trial Court, on the verdict, found HULLUM and LENTZ guilty of two (2) counts (wiretapping and conspiracy). The case was appealed to the Fifth Circuit which affirmed (#79-5418, 8/25/80) ___F(2)___, and denied rehearing and the suggestion for rehearing en banc on November 3rd, 1980. HULLUM now seeks relief.

II. SC* Rule 21.1(a)

i. Whether the Trial Court and the Fifth Circuit erred in permitting HULLUM to be convicted of the crime of wiretapping where the United States failed to prove an essential element of the offense as defined in 18 USC §2511 as implemented by the definition of "wire communication" in 18 USC §2512?

ii. Whether the Trial Court and the Fifth Circuit erred in permitting HULLUM to be convicted upon an incorrect charge of the Trial Court on Intent?

*United States Supreme Court

iii. Whether the Trial Court and the Fifth Circuit erred in permitting HULLUM's conviction on facts reflecting impermissively excessive governmental involvement in the crime and/or erred in permitting conviction without charging the jury on said issue?

iv. Whether the Trial Court and the Fifth Circuit erred in permitting HULLUM to be convicted on the face of harmful impermissive prosecutorial impropriety (secreting evidence by misrepresentation to gain an advantage and gross violation of the Canons of Ethics)?

v. Whether the Fifth Circuit erred in looking only to facts which supported the verdict?

III. SC Rule 21.1(b)

The parties to this case were the United States of America; R. C. HULLUM; William Lawrence Lentz; and Charles Claude Johnston (the latter having plea-bargained out of the case).

IV. SC Rule 21.1(c)

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V. SC Rule 21.1(d)

No "opinion" was delivered by the Trial Court. The Opinion of the Fifth Circuit is with their Clerk in their #79-5418, 8/25/80, ____F(2)____.

VI. SC Rule 21.1(e)

(i) Judgment and Sentence of the Trial Court was on July 31st, 1979. The Opinion of the Fifth Circuit was on August 25th, 1980.

(ii) Rehearing was overruled by the Fifth Circuit on November 3rd, 1980, and on November 17th, 1980, they granted a Motion to Stay Issuance of Mandate to December 3rd, 1980, for filing Certiorari with the provision that the stay would last until final disposition, if filed in that time.

(iii) N/A

(iv) 28 USC §1254.

VII. SC Rule 21.1(f)

Apart from the United States Constitution (5th and 14th Amendments), this case involves or uses:

18 USC §2510(1)

> "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communication by...any person engaged as a common carrier...for the transmission of interstate or foreign communication;"

18 USC §2511(1)(a)

> "...any person who willfully intercepts, endeavors to intercept, or procures any other person to intercept...any wire or oral communication shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 USC §2512(b)

> "...any person who willfully...possesses... any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications, ...shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 USC §3500

> (Otherwise known as the *Jencks Act*; leave is asked to dispense with its reproduction since its contents are well known.)

DR 7-103 (American Bar Association)

> "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has not counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

EC 7-13 (American Bar Association)

> (Prosecutors) "...should not intentionally avoid pursuit of evidence merely because (they) he believes it will damage the prosecutor's case or aid the accused."

VIII. SC Rule 21.1(g,h,i)

> *(References to "___/___" are to Volumns and Pages of the Record in this case consisting of nine volumns.)*

HULLUM was the Sheriff of Burnet County, Texas, and he had two deputies: Hall and Fargo, who were friends with an FBI agent named Hoglund (5/247, 8/958-959). These two men began a course of conduct including lying (5/189) and deception (5/191; cf. 5/242) with an alleged intent of catching HULLUM, Lentz and Johnston in wiretapping.

Part of the scheme of Hall, Fargo and Hoglund was to tape record HULLUM and Lentz and Johnston and get evidence to convict them. Factually these tapes verified HULLUM's version (see below) of what happened more so than they did Hall's version because it is clear from the tapes that Hall was the first person to mention wiretapping (6/247); he was the first to suggest that HULLUM use Lentz (6/258); and he was the first to suggest an ancilliary burglary (6/285). Admittedly, the tapes added nothing to the case; they came too late and didn't verify what Hall and Fargo were contending happened (6/263; 6/267 and 8/996).

HULLUM contended that Hall had told him that Hall had procured a wiretapping order from the United States District Court and that what occurred was done pursuant

to that Order (8/806 et seq.). Thus, what was *done* by HULLUM was not illegal.

Whether it was Hall's or Fargo's idea to do this surreptitiously, or HULLUM's idea to comply with a U.S. District Court Order, an attempted wiretap was done on a house located at Route 2, Box 72, Morman Mills Road in Burnet County.

> **And whatever Hall's intentions, he got HULLUM's job on the day HULLUM was arrested (6/288) and made Fargo his deputy the following day (6/290) with the help of FBI Agent Hoglund (8/960 et seq.).**

Mary Gail Knight lived at this house and had for four-and-one-half years (7/613). She had a phone there (7/614); it was a four-party line. Some *four months prior to March 8, 1979, Patricia Maddox had left that house and did not live there on March 8th or 9th of 1979 (7/614-615); nor did she live there on March 14th or 15th of 1979;* neither did she live there in February of 1979 (7/615; cf. 7/619). Ms. Knight indicated that no one was in the house during the summer of 1978, and she didn't know if Ms. Maddox lived there during that summer or not (7/616). In March of 1979, Ms. Maddox was living in Dallas, Texas.

(NOTE: In the whole of Ms. Knight's testimony *[7/613, 632]* she never testified to the name of her phone company nor to the fact that she did or did not have an area code number.)

Ms. Wall testified that she was on the same party line with Ms. Knight and that her phone number was "Area Code 512 - 756-4028" (7/633, 634).

(NOTE: In the whole of Ms. Wall's testimony *[7/633, 638]* she never testified to the name of her phone company.)

At Vol. 5, page 113, the Government introduced Exhibit 30 and Exhibit 30 B into evidence, which was the tape recording clandestinely made by Hall and Fargo on March 9, 1979. At page 26 of that Exhibit, the following dialogue takes place:

Hall: Our phone system out here is a little more obsolete than what they have in Austin, too; I don't know if you can do that on a party line. Some of this phone system is some kind of mess...

Fargo: This is General Telephone too.

Hall: No, this is Continental; one step below General.

No other evidence relating to the status of the phone was introduced by the Government prior to its resting its evidence in chief (8/791).

AFTER the defense made a motion for judgment of acquittal (8/794), the Government said - *for the first time* - in response to a motion for acquittal by Lentz (8/794):

> "Your Honor, the Court - the Court can take judicial notice of the fact that a telephone communication is an interstate - it's a device capable of carrying interstate commerce communications. The two witnesses testified that these were telephones that were registered to them and the evidence is clear that interstate commerce and its nexus is present." (8/795).

HULLUM joined in Lentz' motion which was overruled (8/798). *AFTER* this, HULLUM made a motion in limine that the Court direct the Government that unless the door was opened, they were to present no further evidence upon the question of common carriage and interstate commerce regarding the subject phone of this lawsuit (8/800). This was agreed to by the Government (8/801 at lines 14 and 16) and effectively granted; or at least, the Government made no further showing of common carriage or interstate commerce.

> (NOTE: The Court never took judicial notice of anything. Other than the above, *the Government never requested* the Court to take judicial notice of anything. The Court never

charged the jury on judicial notice or anything judicially noticed, *nor did the Government request* the Court to do so.)

Prior to trial, in informal discovery sessions, the Government showed the Attorneys for Defendants what later was introduced into evidence as Exhibits 7 through 25, inclusive of Exhibit 11 which was a hand set (6/478) and represented to them that these were the Exhibits with which they intended to prove Count FOUR of the Indictment (1/12); i.e. possession of a "hand set", the design of which "rendered it primarily useful for the purpose of surreptitious interception of communications." The Attorneys for the Defense were told that an FBI agent would be available to so testify (4/8). No copies of the FBI statements were *then* furnished to the Attorneys for the Defendants. When the trial commenced, the Government furnished to the Attorneys for Defendants a copy of the Statement of Agent Schmidt (1/141, 142) in which the FBI agent represented that the device was so designed. *BEFORE* Agent Schmidt was put on the stand, the Government introduced Exhibits 7 through 20, inclusive of Exhibit 11 (the hand set, 6/478-486) after which they called Agent Schmidt to the stand

(8/777). His testimony was so clear (8/777-791) that immediately after he finished, the Government rested (8/791 at line 6), and the Court granted a motion for judgment of acquittal on Count FOUR to both defendants because the Government failed to prove that the Exhibit was anything other than an ordinary telephone lineman's hand set, and was not manufactured nor primarily designed for surreptitious interception of communications (nor were Exhibits 7 through 20); cf. US v SCHWEINS 569 F(2) 965 (5th 1978).

In his final argument to the jury, the Prosecutor said:

> "Is there any doubt who brought the evidence to you? They did. Did the Government get this? Did the United States go and ask Mr. Hall for this? Who did? They did." (9/1123)

while holding Exhibit 11 in his hands.

Again later, on the same page, he referred to the Exhibits; also at other places in his argument. At all such times, the Prosecutor was using Exhibit 11 (4/8).

> (NOTE: This was testified to at the Motion for Judgment of Acquittal and Sentencing Proceedings, Vol. 4 of the Record; but the Prosecutor was present who did this, and he never took the stand to deny the testimony; cf. US v BUENO, *447 F[2] 903 at 906, 5th, 1971.*)

Further, the Government offered to stipulate that one Bob Williams would testify as an anti-character witness against HULLUM. Relying upon their representation (9/1041), HULLUM so stipulated, BUT Bob Williams would not so testify, which appeared on HULLUM's Motion for Judgment of Acquittal and Sentencing Proceedings (4/4).

IX. SC Rule 21.1(j)

(Fairly included in the five questions presented for review are the following amplifications.)

A. SUFFICIENCY

The first question presents the sufficiency of the Government's case. HULLUM contends that the Government failed to prove that the phone involved was a common carrier for the transmission of communications in interstate commerce; 18 USC §2510(1).

The prosecution in criminal cases must - constitutionally - prove all of the essential elements of any crime before conviction (or submission to the jury). 18 USC §2511(1)(a) sets out the essential elements of wiretapping, one of which is that there must be an interception or endeavor to intercept a "wire communication". To prove this, the Government must prove common-carriage and interstate-commerce. Here the Government proved that a phone on a party

line was involved; it proved a phone number; it proved that the phone company was named "Continental"; and that the phone had an area code. It proved nothing else. *It did not prove that the phone was operable, and it did not prove what "Continental" was* (i.e. a connecting carrier, a furnisher of handsets, a "sharer", a private carrier). The Fifth Circuit held:

> This was sufficient; and that the common-fund-of-knowledge doctrine was sufficient to offer support for the jury's finding of guilt.

This holding is squarely contra to US v JONES 580 F(2) 219 (6th, 1978) and to US v BLATTEL 340 F Supp 1140 (NDIa 1972) and is squarely contra to the teachings of US v BURROUGHS 379 F Supp 736; 510 F(2) 967; 537 F(2) 1156; 564 F(2) 1111 (8th 1977).

In JONES and BLATTEL, the Government proved that a phone, a phone number and South Central Bell (JONES) and Northwestern Bell (BLATTEL) were involved. Both the 6th Circuit (JONES) and the 8th Circuit at District level (BLATTEL) held that this was insufficient; and although no phone company was mentioned in BURROUGHS, and the matter dealt with the interception of oral com-

munication, it was proven that a phone in a motel had been converted to a listening device and the 8th Circuit (at Circuit level) held that the proof of common-carriage and interstate-commerce was insufficient.

Again the Fifth Circuit goes squarely contrary to the 6th Circuit in this case because JONES had before it the question of whether the common-fund-of-knowledge doctrine could be used to support proof *beyond a reasonable doubt* that South Central Bell Telephone Company was in fact a common carrier in interstate commerce. The 6th Circuit held the common-fund-of-knowledge doctrine not to be applicable and that proof of common-carriage and interstate-commerce must be - if not by direct or circumstantial evidence - by judicial knowledge per Federal Rule of Evidence, 201 et seq. No judicial knowledge was taken in this case - nor even asked for - until *after* the Government closed its case (8/795).

> (If a telephone company named *"BELL"* cannot raise common carriage nor interstate-commerce from the common-fund-of-knowledge, how much less can one named *"CONTINENTAL"*?)

It is submitted that the common-fund-of-knowledge doctrine in its purest form

may not be used for conviction per the following:

> 1. In its purest form, the common-fund-of-knowledge doctrine applies to *notorious* facts, see 1 TEXAS PRACTICE: Law of Evidence, 3rd Ed. §151.
>
> 2. In its less pure form, it applies to matters subject to judicial notice and must be governed by the Federal Rules of Evidence, see JONES (supra);
>
> 3. In its even less pure form, it applies to inferences and/or presumptions. However, SANDSTROM v MONTANA 442 US 510 (1979) and ULSTER COUNTY COURT v ALLEN 442 US 140 (1980) make it abundantly clear that neither an inference nor a presumption can be used to prove an essential element of a criminal case unless the inference or presumption flows from the proven fact beyond a reasonable doubt.

There are many cases, SANDSTROM and ULSTER COUNTY being two, which permit the use of an inference or presumption to prove an essential element of a crime where the inference or presumption flows from the proven fact *beyond a reasonable doubt*; if a fact within the common-fund-of-knowledge is such, then it may be used. *The facts in this case do not give rise to such a presumption, nor does the Fifth Circuit use the common-fund-of-knowledge doctrine in this fashion.*

There are cases, such as JONES supra, and Federal Rules of Evidence (Rule 201 et seq.) which permit judicial notice to be used; but in doing so, the Federal Rules of Evidence must be complied with. *Judicial Notice as envisioned by Rule 201 et seq., was not complied with in this case, nor does the Fifth Circuit use the common-fund-of-knowledge doctrine in this manner.*

No cases could be found where any Court permitted the common-fund-of-knowledge doctrine to sustain a finding of guilty where the doctrine was used in its purest sense.

> (NOTE: Probably this is so because if the common-fund-of-knowledge were permitted to be so used, then the only measure of "proof" would be the *intensity of notoriety*. I.e. the standard would have to be the sufficiency of notoriety of the fact proven by the common-fund-of-knowledge. Such a standard would appear highly questionable to overcome the Constitutional presumption of innocence, or satisfy the Constitutional requirement of proof beyond a reasonable doubt.)

If such were the case, then the requirement under the U.S. Constitution that the prosecution prove its case beyond a reasonable doubt would be emasculated, as would be the presumption of innocence afforded to all defendants. No *standard*

of proof would be placed on the prosecution; nor would any *standard of proof* be required to overcome the Constitutional protection of the 5th and 14th Amendments given to all defendants.

> (NOTE: Somewhere between what human beings ordinarily know and what the prosecution must constitutionally prove lies a line dimly perceived. But clearly here the question of proving common-carriage and interstate-commerce should not be on the "ordinary knowledge" side of the line. Lawyers themselves would be hard pressed to know what common-carriage and/or interstate-commerce is; yet the Trial Court charged the jury that "wire communication" means common-carriage and interstate-commerce *[9/1142]*. Further, the Trial Court charged the jury that the proof of a wire communication, as previously defined *[to include common-carriage and interstate-commerce]* was an essential element of the offense *[9/1152]* without which conviction could not be had. No proof came in as to common-carriage or interstate-commerce. How could any juror find that what was proven equalled common-carriage or interstate-commerce? It is no wonder that the 8th and 6th Circuits rejected such a limited showing as "proof" beyond a reasonable doubt of common-carriage and/or interstate-commerce, AND it is no wonder that the Fifth Circuit in this case referred to the Government's proof as "skimpy".)

B. CHARGE ON INTENT

To sustain the complained of charge on intent in this case, the Fifth Circuit

relied on US v CHIANTESE 560 F(2) 1244 (5th 1977). It is submitted that this is error for several reasons:

1. CHIANTESE holds that only the complained of charge is to be considered; not the entire charge nor curative language. This is squarely contra to CUPP v NAUGHTEN, 414 US 141 (1973) which holds that the entire charge must be considered where one part of it is objected to.

2. CHIANTESE holds that the proper method of testing a complained of charge is to consider what it reasonably tells the jury. SANDSTROM holds that the proper method of testing a complained of charge is to consider "...the way in which a reasonable juror could have interpreted the instruction." (emphasis added) In so following CHIANTESE the panel of the Fifth Circuit went directly contra to BAKER v MUNCY 619 F(2) 327 (4th 1980) and TYLER v PHELPS 662 F(2) 172 (5th 1980), which held that the test of a charge was to determine what *was heard* by a reasonable juror, of *what the effect* of the charge was upon the jury (rather than what the jury is reasonably told).

3. CHIANTESE holds that one may charge on intent (as the trial court did here) even though "intent" was the sine qua non of the defendant's case. This is squarely contra to MORISETTE v US 342 US 246 (1952).

> ("It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." This where intent is an issue. Cf. an analogue, US v DAVIS 583 F*[2] 190 [5th 1978]* where the Fifth Circuit demolished a

charge that ignorance is no excuse where ignorance went to "the heart of defendant's denial of specific intent.")

4. CHIANTESE fails to look to see if the given complained of charge on intent is harmful; so did the Fifth Circuit in the case at Bar. This is squarely contra to SANDSTROM, BAKER and TYLER, supra.

In short, the Fifth Circuit still adheres to its own teachings when this Court has made it abundantly clear that charges such as the one at bar are to be tested by a different standard. SANDSTROM, as reiterated in TYLER, holds that the threshold question is whether the charge given so infected the Trial Court as to render it unfair.

(Thus was SANDSTROM sent back to Montana to have its Supreme Court determine if harm was done. It found there was harm, 29 Mont. Rpts. 2099, 11/18/79.)

The panel here made no such test; if they had, they would have found harm, for HULLUM and his crew *did* what was alleged; they went out to tap a phone. The jury was told that the charge was the law of the case and the law permitted the inference to be drawn that HULLUM had the required intent from the acts he did - even though the heart of his defense was that he was in-

tending to obey a U.S. District Court Order which Hall told him he had. *What HULLUM said* could not - by a reasonable juror - outweigh what the Court told the juror to do, i.e. find intent from the acts done.

C. EXCESSIVE GOVERNMENT INVOLVEMENT

The Panel here holds that the Fifth Circuit leans toward the majority in HAMPTON v US, 425 US 484 (1976), to the effect that impermissively excessive governmental involvement in a crime will bar prosecution. Such a theory is not entrapment, but a different theory, cf. infra.

Even though the Panel did not "decide that the conduct of governmental agents could be so excessive and outrageous as to bar" prosecution, nevertheless it analyzed this case as if such a theory abounded in the Fifth Circuit. It used the HAMPTON theory as a diagnostic tool.

> (Noting in passing that the 2nd, 3rd and 9th Circuits seem to have adopted such a theory.)

After pointing out that the conduct of the Governmental agents here was not as shocking as that in ROCHIN vs CALIFORNIA 342 US

165 (1952) where Government agents pumped out the Defendant's stomach, it said:

> "After all the jury could have believed that then Sheriff Hullum conceived the entire plan to wiretap the Maddox residence." (emphasis added)

The evidence in this case reflects that Hall, Fargo and Hoglund all conspired to trap HULLUM (Lentz and Johnston). The facts are that Hoglund equipped Hall and Fargo with governmental tape recording devices and that Hall and Fargo (both law enforcement persons) initially brought up the idea of tapping, burglaries, and the use of Lentz. The evidence reflects that they went forward with the plan and actually participated in the attempted wiretap themselves. The evidence is clear that this was done for the purpose of getting HULLUM's job for Hall. Hoglund, an FBI agent, went and spoke with the County Judge in favor of putting Hall in HULLUM's position as Sheriff which occurred within the hour after HULLUM was arrested.

It is submitted that this and this alone suffices to bring this case within the majority of HAMPTON and effectuate HULLUM's discharge.

All persons have a Constitutional right to be free from Governmental luring into crime. Entrapment - as a conceptualist law theory - has more or less degenerated into the free use of governmental agencies (persons or material) where prior disposition to crime is patent. But no one such as HULLUM, a Sheriff, should be the subject of governmental experiment as to whether they will or won't commit a crime. Constitutionally (whether by the 4th, 5th, 6th, 9th or 14th Amendments or their peripheral rights), people should be free from such intrusion by law enforcement people (particularly FBI agents).

If, however, HULLUM was told by Hall that Hall and the Organized Crime Unit had a U.S. District Court Order (when none existed) that the wiretap was permitted, then the governmental intrusion clearly becomes impermissible; and clearly, a jury could have believed this, for HULLUM's version of the story was supported by the tapes as much as Hall's version.

The question of whether Hall told HULLUM this or not is a factual question on which the application of the teachings of HAMPTON apply. Since this was the case,

the matter should have been submitted. HULLUM requested the Trial Court to submit the question to the jury per his requested charges Nos. 19 and 20. The Trial Court refused and the Fifth Circuit sustained the refusal.

Governmental involvement in crime as barring prosecution is a delimitation of the doctrine of "Sovereignty". Although at common law, and even upon the advent of "natural law" principles, the "Sovereign" was declared either to have unlimited power and could do no wrong - or that the "Sovereign" was unaccountable to anyone; YET upon the advent of Democracy, the concept of "Sovereignty" underwent a redefinition. The "Sovereign" was limited by the contract of the tribe of people that became the United States Constitution.

That a Sovereign may have power that cannot be exercised, or - in areas - have no power, or in other areas have limited power, seems to be a distinction that is not helpful in analysis of what a "Sovereign" may or may not do. But assuredly, a "Sovereign" has no power to violate the law, nor, it is submitted, has the "Sovereign" any power to involve itself in crime;

and if it does, it should not be allowed to invoke due process against the one that becomes the object of its involvement. Did the "Sovereign" actually involve itself in crime?

Due process would demand that the extent of the governmental agents' involvement in any crime be determined by the jury. If it is so determined as being outrageous and unconscionable, then prosecution should be barred.

D. ON PROSECUTORIAL MISCONDUCT

Exhibit No. 11

The secretion of evidence can be done in two ways; first by hiding it; and second, by misrepresenting what the evidence consists of. Here the prosecution secreted its evidence by the latter method.

Exhibit No. 11, a telephone lineman's handset, was represented to Defendants as being wiretapping equipment as defined by the act. One the day of trial, a statement by a governmental agent was handed to Defendants which so stated. But when the same agent testified, it was to the effect

that Exhibit No. 11 was only a handset and was not wiretapping equipment as defined by the act.

HULLUM was prejudiced by the deception of the government in that had the truth of Exhibit No. 11 been revealed, as the *Jencks Act* requires, then a pretrial motion to dismiss the fourth count of the indictment would have been filed and most probably granted; see US v SCHWEINS 569 F(2) 965 (5th 1978). But the *TRUTH* of it was not revealed. The written statement of the government's witness reflected that he would testify that the handset

> "...by the nature of its design, ..."

rendered it

> "...primarily useful for the purpose of interception of wire communications."

But his testimony was that the handset was primarily designed and useful for ordinary lineman's purposes.

The handset was introduced into evidence *after* the jury had been told that the Defendant HULLUM was charged with possessing wiretap equipment.

ANTI-CHARACTER WITNESS

The Fifth Circuit is now committed to

the proposition that if the Government commits a prejudicial error by representing that a witness would testify against the character of the Defendant, where in fact the witness would not do so, and the Government knew it, then the Government can cure this by simply presenting other witnesses who would so testify.

DISCUSSION

Not only did the prosecutors in this case violate the *Jencks Act*, but they violated the principles of:

GIGLIO vs US	405 US 150 (1972)
BRADY vs MARYLAND	373 US 83 (1963)
MOONEY vs HOLOHAN	294 US 103 (1934)
PYLE vs KANSAS	317 US 213 (1942)
NAPUE vs ILLINOIS	360 US 264 (1959)
US vs AGURS	427 US 97 (1976)
ALCORTA vs TEXAS	355 US 82 (1957).

See also 34 ALR(3) 16 at p.47, where the principles of prosecutorial misconduct in the secretion of evidence applies to evidence relating to the credibility of witnesses and includes a reference to:

POWELL vs WIMAN 287 F(2) 275 (5th 1961).

Here the prosecutors violated the admonitions of the right to a fair trial provided for by society as a whole in the Constitution of the United States; further, in so doing, they violated the Canons of Ethics.

The Code of Professional Responsibility adopted by the American Bar Association in DR 7-103 says:

> "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Clearly, to say the Government lawyers did not know that Exhibit No. 11 was not wiretapping equipment, or to say they did not know that the witness Williams would not testify against HULLUM's character, is to indulge in a *"presumption"* that is unwarranted, unfounded, and that is contrary to what should be *"presumed"*.

The Government is a richer and better evidence-gatherer than the Defendant in any criminal case. The Government here had the FBI and other law enforcement officials to do their evidence-gathering work. The Government is therefore not only *"presumed"* to know their evidence, but also *"presumed"* to be able to evaluate it.

The aforementioned Code of Professional Responsibility adds the further admoni-

tion to prosecutors, in EC 7-13, that they:

> "...should not intentionally avoid pursuit of evidence merely because (they) he believes it will damage the prosecutor's case or aid the accused."

The Fifth Circuit's Opinion presents no *"REASON"* why such conduct should be allowed to proceed unchecked. No *"JUSTICE"* is made manifest or made to appear in what the Panel has ruled on for over and above all else, prosecutorial conduct which inculcates deception to give the prosecutors an advantage based upon such deception violates the principles of fairness and justice embodied in the Constitution of the United States.

E. CHANGE IN LAW OF TESTING VERDICTS

The Fifth Circuit, using a "longstanding" and "widespread" formula, says that:

> "...the evidence must be considered in the light most favorable to the verdict...we must draw all reasonable inferences and decide credibility choices in favor of the jury's decision."

It is submitted that:

1. This formula has changed; and if it has not,
2. then the Fifth Circuit didn't comply with it.

I.

"A longstanding, widespread practice is not immune from constitutional scrutiny." PAYTON v NEW YORK ___US___, 63 LE(2) 659 (1980). JACKSON v VIRGINIA 443 US 307 (1979) in reliance on In Re WINSHIP 397 US 358 (1970) changed THOMPSON v LOUISVILLE 362 US 199 ( ). In testing the validity of a criminal case (in post judgment relief) the "no evidence" rule of THOMPSON no longer obtains; rather the habeas corpus court must consider *whether there was sufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt*; not just whether there was *any evidence to support the verdict.* WINSHIP gives those charged with crimes the right to a *rational judgment.* The right is of constitutional proportion (see Stevens' dissent). If such is the case in post-judgment habeas corpus cases, then how could an appellate court test otherwise in a direct appeal?

Here the Fifth Circuit, using a "longstanding" and "widespread" formula, says it will test HULLUM's verdict of guilt by considering only the evidence most favorable to the verdict. This certainly is not

logical, for if it is, the law is left with the following:

ON APPEAL	ON POST-JUDGMENT RELIEF
The test is to use only evidence supportive of the verdict.	The test is to use all the evidence.

(Which would be to say that ON APPEAL, the rational test is much less than if the same Defendant were to have his case made final and then seek POST-JUDGMENT RELIEF. The case at bar says only consider the evidence supportive of the verdict. JACKSON says in post-judgment relief cases, look at all the evidence and see what a rational juror would have done.)

That JACKSON was a non-jury trial ought not to make any difference, since the rationale of WINSHIP and JACKSON comes from a constitutional right to a rational judgment which is equally the target of juries as well as judges. To put it another way, COURTS should cure the product of irrational juries just as they should cure the product of irrational judges.

This point has never come before this Court before, but it poses a problem of reconsidering the formula used by the Fifth Circuit in the light of JACKSON; cf. PILON vs BORDENKIRKER, ____US____, 62 LE(2) 1 (1979).

II.

A reading of the facts in the case and the manner in which the Fifth Circuit laid them out reflects that the Fifth Circuit paid no attention to any other evidence than the Government's evidence, apparently *upon the theory that the Government's version of the evidence constituted the evidence most favorable to the verdict.* Both Hall and HULLUM testified. Hall testified that HULLUM was the first one to mention the wiretap. HULLUM testified that it was Hall. The tapes support HULLUM's testimony and not Hall's. *The Fifth Circuit does not mention this - only Hall's testimony.*

Hall testified that HULLUM was the first to mention the use of Lentz; HULLUM testified that it was Hall. The tapes support HULLUM's testimony, not Hall's. *The Fifth Circuit doesn't mention this - only Hall's testimony.*

Hall testified that HULLUM was the first to mention the burglaries; HULLUM testified that it was Hall. The tapes support HULLUM's testimony, not Hall's. *The Fifth Circuit doesn't mention this - only Hall's testimony.*

Hall, as was his friend Fargo, was a confessed liar and deceiver with the avowed intent of catching HULLUM (5/189, 191 and 242). *The Fifth Circuit does not mention this.*

Accordingly, it is clear that the *manner* in which the Fifth Circuit applies the "longstanding" and "widespread" rule of looking only to evidence that supports the verdict is to exclude all evidence except the prosecution's version, rather than apply the rule as perhaps WINSHIP suggests; i.e. *in a rational manner.* To apply the "longstanding" and "widespread" test of using only "supportive" evidence to test a verdict, one doesn't use only prosecutorial evidence; one uses only admissible, credible, supportive evidence from the record, and to make the determination that the used evidence is "supportive", one has to look at the entire record to determine if such evidence is admissible and credible. The Fifth Circuit did not do that here.

X. SC Rule 21.1(k)

Attached hereto as appendix is a copy of the Fifth Circuit's opinion in this case.

(In the professional opinion of the undersigned, it is necessary and proper that the original Record of this case be inspected by this Court in lieu of copies.)

The entire Record in this case has been requested pursuant to SC Rule 13.

The Fifth Circuit has entered no judgment in this case yet; only its opinion.

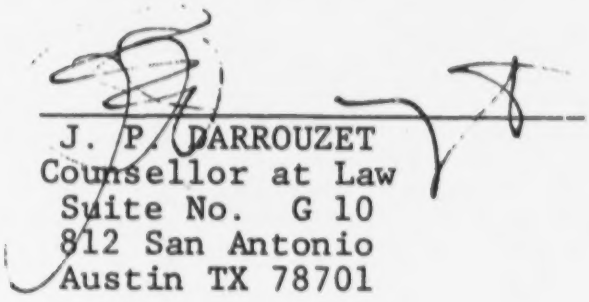
(No Order was received from the Fifth Circuit overruling HULLUM's Motion for Rehearing filed with that Court. A letter dated November 17, 1980, was received from the CLERK of the Fifth Circuit to the effect that "an order has this day been entered denying the petition for rehearing, and... the petition for rehearing en banc has also been denied.")

XI. PRAYER

ACCORDINGLY, HULLUM prays this Court to take this case, hear it, and thereafter reverse the Fifth Circuit and order the

prosecution dismissed under the teachings of BURKS vs US, 437 US 1 (1978), et seq.

RESPECTFULLY SO PRAYED,



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ATTORNEY FOR PETITIONER

(Texas Bar License No. 05396000)

(Member of the Bar of the United States Supreme Court)

UNITED STATES of America, Plaintiff-Appellee,

v.

William Lawrence LENTZ and Raymond Clinton Hullum, Jr., Defendants-Appellants.

No. 79-5418.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1980.

Defendants were convicted in the United States District Court for the Western District of Texas, Jack Roberts, J., of illegal wiretapping, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) testimony that number of telephone in question included area code permitted jurors to conclude that the telephone was capable of being utilized for interstate telephone calls and that the telephone was not merely part of private intercom system, and thus evidence was sufficient to establish that wire communication was furnished by common carrier; (2) evidence, including defendant's statement that he knew transaction was illegal and that he was willing to continue his efforts to wiretap phone despite such knowledge, was sufficient for jury on entrapment issue of predisposition; (3) it was not fundamentally unfair to prosecute either defendant; and (4) jury instruction on intent and on inferences permissible from evidence did not improperly shift burden of proof to defendants where the instruction was couched in permissive, and not mandatory, language.

Affirmed.

1. Criminal Law ⇐1144.13(3)

On appeal, evidence must be considered in light most favorable to guilty verdict, and Court of Appeals must draw all reasonable inferences and decide credibility choices in favor of jury's decision.

2. Telecommunications ⇐497

Testimony that number of telephone in question included area code permitted jurors to conclude that the telephone was capable of being utilized for interstate telephone calls and that the telephone was not merely part of private intercom system, and thus evidence, in prosecution for illegal wiretapping, was sufficient to establish that wire communication was furnished by common carrier. 18 U.S.C.A. §§ 2510, 2511.

3. Criminal Law ⇐330, 569

In order to raise entrapment defense, defendant must first present some evidence that government agents induced him to commit offense charged; then the government must prove beyond reasonable doubt that accused was ready and willing, without persuasion, and was awaiting any propitious opportunity to commit offense.

4. Criminal Law ⇐739.1(3)

Evidence, including defendant's statement that he knew transaction was illegal and that he was willing to continue his efforts to wiretap phone despite such knowledge, was sufficient for jury on entrapment issue of predisposition.

5. Criminal Law ⇐37(2)

Where person has no previous intent or purpose to violate law, but is induced or persuaded by law enforcement officers or their agents to commit crime, he is

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victim of entrapment, and law as matter of policy forbids his conviction in such case; on other hand, where person already has readiness and willingness to break the law, mere fact that government agents provide what appears to be favorable opportunity is not entrapment.

6. Telecommunications ⇐497

It was not fundamentally unfair, on basis of outrageous government conduct, to prosecute law enforcement official for alleged willful and knowing breaking of wiretap law, nor was it unfair to prosecute civilian who voluntarily and knowingly employed illegal methods in police officers' claimed efforts to catch criminals. 18 U.S.C.A. §§ 371, 2511(1)(a), 2512(1)(b); U.S.C.A.Const. Amends. 5, 14.

7. Telecommunications ⇐497

Evidence of proposed break in by one defendant was relevant and admissible, in prosecution for illegal wiretapping, where defendant was brought into group by another defendant both to perform wiretap and to commit the break in, and defendants' discussions about the proposed break in were intertwined with conversations about the wiretapping. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

8. Criminal Law ⇐338(7)

In prosecution for illegal wiretapping, it was not abuse of discretion for trial court to refuse to exclude evidence of proposed break in on basis that it unfairly prejudiced defendant. Fed. Rules Evid. Rules 403, 404(b), 28 U.S.C.A.

9. Indictment and Information ⇐128

Conviction obtained pursuant to multiplicious indictment does not have to be reversed in all cases since indictment may charge single crime in variety of forms to avoid fatal variance of evidence.

10. Criminal Law ⇐1181

If multiplicious indictment leads to cumulative sentences, appropriate remedy is to remand for dismissal of one count.

11. Criminal Law ⇐1181

Where defendants each received only one sentence on substantive count, there was no reason to upset disposition made by trial court on alleged basis that indictment was multiplicious.

12. Criminal Law ⇐1167(2)

Record established that defendants, who were convicted of illegal wiretapping, were not prejudiced by government's being allowed to go to trial on count charging defendants with possession of wiretapping instruments.

13. Criminal Law ⇐1167(2)

Technical variance between indictment and proof offered at trial did not entitle defendant to reversal of conviction absent showing that substantial rights were affected by such variance.

14. Criminal Law ⇐778(5)

Jury instruction on intent and on inferences permissible from evidence did not improperly shift burden of proof to defendants in prosecution for illegal wiretapping where the instruction was couched in permissive, and not mandatory, language. 18 U.S.C.A. §§ 371, 2511(1)(a), 2512(1)(b).

15. Criminal Law ⇐1148

When defendants are properly joined in indictment, denial of motion for severance is subject to reversal only for abuse of discretion.

16. Criminal Law ⇐622(2)

Fact that one defendant had traditional entrapment defense while other defendant did not was not grounds for severance in prosecution for illegal wiretapping.

17. Criminal Law ⇐1167.1(1)

Defendant was not prejudiced by alleged instances of prosecutorial misconduct, which involved claimed discovery impropriety and prosecutor's allegedly obtaining by deceit stipulation to one witness' testimony, and thus defendant was not entitled to reversal on basis of such alleged misconduct.

Appeals from the United States District Court for the Western District of Texas.

Before AINSWORTH and GEE, Circuit Judges, and HUNTER *, District Judge.

GEE, Circuit Judge:

In this somewhat bizarre case, a former sheriff of Burnet County, Texas, R. C. Hullum, one of his former deputies, Charles Johnston,[1] and a civilian who had cooperated with law enforcement officers in the past, William Lentz, were indicted for illegal wiretapping.[2] The trial court granted motions for acquittal on count four, but Lentz and Hullum were convicted by a jury of the remaining three counts of the indictment. The government elected to proceed to sentencing on the conspiracy conviction and only one substantive offense as to each defendant. Hullum was sentenced to concurrent sentences of one year imprisonment on each of the two counts, with the court ordering that he be released as if on parole after serving nine months. Lentz received the same concurrent terms of imprisonment and was ordered to be released as if on parole after serving six months. They now appeal to this court, and we affirm.

Factual Background

Sometime in mid-February 1979, Hullum, who was then the duly elected sheriff of Burnet County, discussed with his chief deputy, Jack Hall, Hullum's interest in curtailing illegal drug traffic in the county and his belief that a house on Mormon Mill Road was occupied by two women[3] who were involved in that traf-

* District Judge of the Western District of Louisiana, sitting by designation.

1. Johnston plead guilty and testified for the government at trial. He is not a party to this appeal.

2. Specifically, count one of the indictment charged them with conspiracy to intercept wire communications in violation of 18 U.S.C. §§ 371, 2511(1)(a); count two charged Hullum with the completed, substantive offense of intercepting, endeavoring to intercept, and procuring the interception of wire communications in violation of 18 U.S.C. § 2511(1)(a) and charged Lentz and Johnston with aiding and abetting Hullum; count three charged Lentz with the completed offense and Hullum and Johnston with aiding and abetting; count four indicted Lentz for possession of a device for use in the surreptitious interception of communications in violation of 18 U.S.C. § 2512(1)(b) and charged Hullum with aiding and abetting in the last-mentioned violation.

3. Hullum believed that Patricia Maddox and another woman lived in the house during the events in question; testimony at trial, however, showed that although Maddox had lived there, she had moved out before February 1979. Nevertheless, the house was often referred to as the "Maddox residence" in the trial testimony, and we will use that terminology here. *See also* our discussion of the indictment, infra.

fic. Hall testified that a search warrant had been executed on the house the preceding August, yielding a little marijuana, but that he knew of no intelligence information on any drug operation there in February 1979. According to Hall, Hullum suggested that a phone tap be made on the Maddox residence's line. Both men seemed aware that the proposed tap would be illegal.

At about this same time, Sheriff Hullum also suspected that another residence in the county, this one in the Granite Shoals area and wholly unconnected with the drug traffic problem, was a repository for stolen property. Hall testified that he explained to Hullum that it would take time to get a confidential informant within the stolen goods ring to work undercover for the sheriff's office. At that point, Hullum asked Hall to break into the house to obtain serial numbers from the stolen property so that a search warrant could be executed and suggested that Hall enlist the assistance of William Lentz, a civilian who had previously served in a confidential informant capacity for law enforcement officers.[4] Evidently Hullum repeated his request for a break-in several times over the next few days.

Deputy William Fargo was Burnet County's representative on the Organized Crime Unit[5] and spent much of his time in Austin. Hall discussed with Fargo the sheriff's plans to wiretap the house on Mormon Mill Road and to break into the house at Granite Shoals. Fargo in turn talked to Lieutenant Bobby Simpson of the Austin Police Department, the head of the Organized Crime Unit, and Special Agent Robert Hogland of the Federal Bureau of Investigation. A few days later, Hall met with Simpson, Hogland, and Fargo in Austin, at which time Hall told the men of Hullum's ideas. Simpson provided Fargo and Hall with recording equipment to wear during their conversations with Hullum. Later the FBI provided Fargo with a more compact recording unit than that provided by Simpson.

The next day, March 8, Hullum, Hall, and Fargo met out in the countryside at a roadside rest area. Hall wore a microphone that Simpson had given him; the receiver and a recorder were in the trunk of Fargo's car. Hall asked Hullum if he still wanted to tap the telephone line from the Maddox residence, and Hullum answered in the affirmative, stating that his informant was a person who shared a party line with Maddox and that the tap would be the only effective way to discover the activities of the smuggling operation. Hullum suggested that Lentz be brought in to do the actual tapping and that he also be approached about the break-in at the Granite Shoals residence.

In the evening of the following day, Hullum, Hall, and Fargo, joined by Lentz, met at Bear Creek Cemetery in Burnet County. Hall again wore a microphone to tape the conversation. During this meeting Hullum told Lentz that he was about to discuss with him the most serious thing he had ever been involved in and that they could be in serious trouble if it were not handled correctly. Hullum then asked Lentz to tap the Maddox telephone line. Lentz evidently was enthusiastic about the operation and agreed to the wiretap; he explained that

4. In the winter of 1978-79, Lentz had worked undercover at the behest of the Organized Crime Unit, a task force composed of law enforcement officers from six contiguous counties and headed by the Austin Police Department, and had helped to break up a counterfeiting ring in early February 1979.

5. *See* n.4, *supra*.

his primary problem would be finding a spot from which he could set up and tap the line and volunteered to get any needed equipment from a friend, at which point Hullum again reminded him that the operation was illegal. Hullum also stressed to Lentz the fact that if anyone were caught, he would be doing "federal time." Nevertheless, Lentz was undeterred; he even indicated that he would be willing to take the blame alone should the illegal activity be uncovered.

Hullum left this meeting briefly to get some equipment that Lentz might be able to use.[6] While he was gone, Fargo and Hall explained the break-in operation at Granite Shoals to Lentz, who seemed willing to undertake that task, also, and discussed various ways to get into the house undetected.

Another meeting was held at Bear Creek Cemetery four nights later. The same participants were present as at the previous meeting there, with the addition of Deputy Johnston. This time Deputy Fargo wore recording equipment provided by the FBI. Lentz told the others that he had obtained the proper equipment with which to tap the line, and he and Hullum discussed the details and location of the tap. Finally, a site near the Maddox house that was hidden from the road during the day was selected. Hullum and Lentz again discussed the illegality of the operation, and Lentz repeated his offer to take all the blame if they were caught. The break-in operation at Granite Shoals was also discussed briefly. Lentz and Johnston left the meeting together to pick up the pole-climbing equipment that Lentz had borrowed from a friend, to whom he had explained that he needed it to hang a night light from a pole. The five men reassembled at the prospective wiretap site and, after looking around, decided to meet in the sheriff's office the next morning to make final plans.

At that morning meeting, Deputy Fargo again wore a microphone and recording equipment. The plans as finally made called for Hall and Lentz to drive with Fargo to the wiretap site in a borrowed truck. Hall volunteered to carry some of the wiretap equipment for Lentz, and Fargo served as their lookout. After Lentz climbed the pole, he or Hall was to radio Johnston, so that the latter could make radio contact with Sheriff Hullum, who had driven to a location near the Maddox residence. Sheriff Hullum then was to go to the residence of his informant, who shared a party line with Maddox, and make a phone call to the sheriff's office, keeping the party line open to enable Lentz to find it and tap into it. All went according to plan for a time, but once atop the pole, Lentz attempted for 15 or 20 minutes to find the right line to no avail. He notified Deputy Hall of this, and Hall walked to the truck and told Fargo. Fargo drove about a mile to the other side of the Maddox residence, found Hullum, and told him of the problem. After Hullum discussed and then rejected the possibility of using someone else to do the wiretap, Hullum told Fargo to direct Lentz to try again for about a half hour to tap the line and, if unsuccessful, to stop and return to the sheriff's office. When Fargo returned to the tap site, he had some difficulty locating Hall and Lentz; after he found them, he told them to break off work. The men all returned to the sheriff's office, and shortly thereafter, Lentz and Sheriff Hullum were arrested.

6. The equipment with which Hullum returned was rejected by Lentz as obsolete; he stated that he could obtain better equipment, perhaps by the next day.

Sufficiency of the Evidence

As one of the elements of the government's case under 18 U.S.C. § 2511(1)(a), it had to prove that the telephone conversations at issue were "wire communications," which are defined in 18 U.S.C. § 2510.[7] Both defendants contend that the government's evidence was insufficient to show that the wire communication in this case was furnished by a common carrier.

[1, 2] Defendants carry a heavy burden here, since the evidence must be considered in the light most favorable to the verdict, and we must draw all reasonable inferences and decide credibility choices in favor of the jury's decision. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Hitsman*, 604 F.2d 443 (5th Cir. 1979). The government introduced testimony by Mary Gail Knight, who lived in the Maddox residence during the attempted wiretap, indicating that her telephone number was 756 4478 and that the telephone line was a four-party line. Mrs. Wall, from whose residence Sheriff Hullum placed the call to the sheriff's office to keep the line open, testified that her phone number was "area code 512-756-4028" and that she was on the same party line with Mrs. Knight. A tape recording clandestinely made by Hall of a meeting at which Hullum and Lentz planned the eavesdropping operation was played before the jury; the recording contains the following conversation:

> Hall: Our phone system out here is a little more obsolete than what they have in Austin, too; I don't know if you can do that on a party line. Some of this phone system is some kind of mess . . . .
>
> Fargo: This is General Telephone, too.
>
> Hall: No, this is Continental; one step below General.

After the government rested its case, Lentz and Hullum moved for judgments of acquittal. At that point the government requested the court to take judicial notice of the interstate nature of the telephone communications, but there is no indication in the record that the trial judge did so. However, the court obviously felt that the foregoing evidence was sufficient to submit the issue of whether the conversation at issue was a "wire communication" to the jury. That is, he obviously believed that a reasonable minded jury would not necessarily entertain a reasonable doubt as to the existence of this essential element. *See United States v. Barrera*, 547 F.2d 1250, 1255 (5th Cir. 1977).

While the evidence of the common carrier status of the company providing the

7. Title 18 of the United States Code provides, in pertinent part:

> § 2511. Interception and disclosure of wire or oral communications prohibited
>
> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> . . . . . .
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> § 2510. Definitions
>
> As used in this chapter—
>
> (1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications . . . .

telephone at issue was thin, and while we do not congratulate the government for its skimpy proof of this element, we think that the evidence presented passes muster. From the testimony, the jury could have concluded, based on the common fund of information supposedly possessed by jurors, that the assignment of an area code to a number indicates that the telephone in question is capable of being utilized in interstate telephone calls and that the telephone was not merely part of a private intercom system.

Defendants point out that in *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978), the government proved only that the telephone at issue was furnished by South Central Bell Telephone Company and that the court refused to allow the jury to use its common experience to draw the inference that the telephone was furnished by a common carrier. Rather, the Sixth Circuit ruled that South Central Bell's status as a common carrier, under the facts presented in *Jones*, must be governed by the judicial notice provisions of the Federal Rules of Evidence. *Id.* at 222–23. Since the government in *Jones* did not move the court to take judicial notice at trial, the Sixth Circuit reversed Jones' conviction. Defendant also relies on *United States v. Blattel*, 340 F.Supp. 1140 (N.D.Iowa 1972), in which the government merely proved that the telephone was provided by Northwestern Bell Telephone Company and moved the court, unsuccessfully, to take judicial notice of Northwestern Bell's common carrier status 17 days after the jury's verdict.

We think the facts introduced by the government in the instant case distinguish it from *Blattel* and *Jones*. Here the government proved a vital fact: the number of the telephone at issue included an area code. In light of the evidence, it was not necessary for the court to take judicial notice of Continental's common carrier status, and the jury could draw an inference of such status from its common fund of knowledge. Since the evidence was sufficient to go to the jury, we find that defendants have not carried their burden under *Glasser*, and we reject their contentions on this point.

Entrapment and Due Process

[3] Lentz argues that the evidence shows that he was entrapped as a matter of law. However, "[i]t is well settled that the question of entrapment, if fairly raised, is one for the jury." *United States v. Benavides*, 558 F.2d 308, 310 (5th Cir. 1977). The defendant must first present some evidence that the government agents induced him to commit the offense charged. *Id.; see also United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979); *United States v. Sherman*, 200 F.2d 880, 882–83 (2d Cir. 1952). Then the government must prove beyond a reasonable doubt that "the accused was ready and willing, without persuasion and was . . . awaiting any propitious opportunity to commit the offense." *Wolffs*, 594 F.2d at 80; *see also Benavides, supra; Sherman, supra.* Put another way, the key to an entrapment defense is the accused's predisposition to commit the crime. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); *Sorrells v. United States*, 287 U.S. 435, 448–49, 53 S.Ct. 210, 215, 77 L.Ed. 413 (1932).

[4] The testimony from the government's own witnesses was sufficient to sustain defendants' burden of production in the instant case. That is, it can be

inferred from the testimony of Hall and others that Lentz was induced by government agents to participate in the wiretapping scheme; thus, the government of necessity shouldered the burden of persuasion on predisposition. Lentz argues that there is no evidence that he had any predisposition to commit the acts alleged in the indictment and that the government's proof failed as a matter of law. We disagree. There was a great deal of evidence in the record from which the jury could find Lentz' predisposition: his statements that he knew the transaction was illegal, coupled with his willingness to continue his efforts to wiretap the phone; his volunteering to provide Hullum with eavesdropping devices; his exculpatory stories, told to the persons from whom he borrowed the equipment, regarding the use of the equipment; and his readiness to "take the rap" for the law enforcement officers should they be caught.

[5] The court's charge on entrapment, to which Lentz makes no objection, correctly spells out the law and the burden of proof for the jury.[8] Thus, since the evidence on predisposition was sufficient to go to the jury and since the jury was given correct guidance, we must uphold the jury's verdict of guilty. In other words, the evidence in Lentz' favor is not "so overwhelming that it [is] 'patently clear' or 'obvious' that [the accused] was entrapped as a matter of law." *United States v. Bower*, 575 F.2d 499, 504 (5th Cir. 1979), *quoting from United States v. Groessel*, 440 F.2d 602, 606 (5th Cir.), *cert. denied*, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971).

Lentz makes much of the fact that the entire plan was conceived by law enforcement officers and that his only motive was to help those officers catch criminals. However, entrapment is not necessarily present merely because government agents provide the opportunity or means to break the law. If Lentz was a willing, knowing, voluntary participant in an illegal scheme, and the jury found that he was, he was not entrapped.

[6] Lentz also argues, and in this he is joined by Hullum, that the conduct of law enforcement agents is so outrageous in this case, and the degree of involvement by law officers so excessive, that due process principles absolutely bar the government from invoking judicial process to obtain a conviction. We note that

8. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred regarding the offenses charged in the indictment, the defendants William Lentz and R. C. Hullum were ready and willing to commit the crime as charged in the indictment, whenever the opportunity was afforded, and that law enforcement officers or their agents did no more than offer the opportunity, then the jury should find that the Defendants William Lentz and R. C. Hullum are not victims of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt as to whether the Defendants had the previous intent or purpose to commit the offenses charged, apart from the inducement or persuasion of some law enforcement officer or agent of the government, then it is your duty to find the Defendants William Lentz and R. C. Hullum not guilty.

five members of the Supreme Court, in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), would accept the argument that in some circumstances government involvement in the crime charged could be so high as to bar prosecution. *See id.* at 491, 493, 96 S.Ct. at 1650, 1652 (Powell, J., joined by Blackmun, J., concurring); *id.* at 495, 96 S.Ct. at 1652 (Brennan, J., joined by Stewart, J., and Marshall, J., dissenting).[9]

We agree with Mr. Justice Powell in his analysis of the defense of entrapment in which he states that " 'entrapment' should now be employed as a term of art limited to [the concept of predisposition]. This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the government has encouraged or otherwise acted in concert with the defendant." *Id.* at 492 n.2, 96 S.Ct. 1651 (Powell, J., concurring) (citation omitted). At least two of our sister circuits have held that excessive governmental involvement in a crime will bar prosecution of a private citizen. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). The Second Circuit has dicta to that effect. *See United States v. Archer*, 486 F.2d 670 (2d Cir. 1973). Our circuit has also indicated, in dicta, that it might accept the defense of outrageous governmental conduct. *See United States v. Till*, 609 F.2d 228, 230 (5th Cir. 1980). Therefore, we will assume, although we emphasize that we do not decide that the conduct of government agents could be so excessive and outrageous as to bar, on due process grounds, prosecution for a particular crime, even if the defendant is shown to have been predisposed to commit the crime.

Even so, while we might very well question the *wisdom* of the prosecutor's decision to bring charges against Lentz,[10] we cannot say with any certainty that it was fundamentally unfair to prosecute Lentz or Hullum. The only case cited by the Supreme Court in *United States v. Russell*, 411 U.S. 423, 431–32, 93 S.Ct. 1637, 1642–43, 36 L.Ed.2d 366 (1973), for the proposition that outrageous conduct might bar prosecution in a proper case, was *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). *Rochin* involved an accused who had had his stomach pumped by the police after his arrest, and this conduct by the police was held to be so shocking as to violate concepts of fundamental fairness under the due process clause. No such shocking

9. In the opinion for the majority, written by Mr. Justice Rehnquist and joined by Chief Justice Burger and Mr. Justice White, the Court states that in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), it "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case . . . where the predisposition of the defendant to commit the crime was established." 425 U.S. at 488–89, 96 S.Ct. at 1649. While concurring in the judgment of the case, Mr. Justice Powell, with Mr. Justice Blackmun, took issue with this holding. *See* 425 U.S. at 492–93, 96 S.Ct. at 1651–52. The concurring opinion points out that the Court had never had occasion to "confront Government overinvolvement in areas outside the realm of contraband offenses." *Id.* at 493, 96 S.Ct. at 1651. Mr. Justice Powell goes on to state, "In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." *Id.*, 96 S.Ct. at 1651–52.

10. We here paraphrase Oscar Wilde and observe that if this is the way Burnet County treats its confidential informants, it doesn't deserve to have any. Oscar Wilde is reported to have opined, regarding conditions in Reading Gaol where he was incarcerated, "If this is the way the Queen treats her criminals, she doesn't deserve to have any."

occurrences took place in the instant case. After all, the jury could have believed that then Sheriff Hullum conceived the entire plan to wiretap the Maddox residence. Regardless of the undercover devices employed, it could hardly shock anyone's conscience to see an elected law enforcement official prosecuted for willfully and knowingly breaking a law designed to protect citizens from just such conduct.[11] While Lentz came into the plan late, he seems to have embraced it wholeheartedly, provided some of the means by which to carry it out, and taken part with full knowledge of the plan's illegality. The fact that Lentz was merely helping the police in their alleged efforts to catch criminals should not make prosecution of him unfair if he voluntarily and knowingly employed illegal methods. Were we to hold otherwise, it would be tantamount to giving police everywhere carte blanche to ignore laws that could have been passed to protect all citizens against improper invasions of their rights by police conduct.

"Burglary" Evidence

Lentz complains that evidence showing his willingness to break into the house at Granite Shoals and obtain serial numbers off the suspected stolen goods should never have been presented to the jury, since it was wholly irrelevant to the crime charged. Alternatively, he contends that if it had some relevance, it still should have been excluded under Fed.R. Evid. 403 as unfairly prejudicial. Lentz' attorney objected every time the prosecution sought to introduce evidence regarding the planned break-in, primarily on grounds that the prosecution continually referred to the operation as a "burglary" when in fact it would not have been a burglary under Texas law. The trial court continued to admit the evidence of Lentz' willingness to participate in the break-in but gave a limiting instruction in its charge in which it defined burglary under Texas law and told the jury that neither Lentz nor Hullum were on trial for burglary. Nevertheless, if the evidence was irrelevant or if its prejudicial nature substantially outweighed its probative value, it should have been excluded under the Federal Rules of Evidence. We will assume that Lentz' objections preserved this point on appeal.

[7] Since the discussions about the proposed break-in were almost hopelessly intertwined with conversations about the wiretapping, we believe that the break-in evidence was necessary to the government in its attempt to tell the whole story of the crime.[12] The government draws support from *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), which approved of proof of extrinsic offenses under a common scheme or *res gestae* analysis "if the uncharged offense is 'so linked together in point of

11. Hullum complains that the trial court refused to give his requested *jury charge* to the effect that it had to acquit him if it found that the actions of the government officers were contrary to common decency and fair play or were so outrageous and offensive as to violate due process. The government, in turn, argues that this is a question of law, not of fact, and was properly excluded from the jury charge. We hold that, as a matter of law, it was not unfair or outrageous to prosecute Hullum for the acts he was charged with committing and that the trial court correctly refused to give such a charge.

12. Of course, the evidence might be admissible under Fed.R.Evid. 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, the government in its brief explicitly rejects this ground of admissibility and instead urges us to accept the "whole story" rationale.

time and circumstances with the crime charged that one cannot be fully shown without proving the other.'" *Id.* at 911 12, n.15 (quoting Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 331 (1956)). We believe that since Lentz was brought into the law enforcement group by Hullum both to perform the wiretap and to commit the break-in, evidence of the break-in would be relevant and admissible under *Beechum*.

[8] The decision to exclude relevant evidence on grounds of its unfairly prejudicial nature rests in the first instance with the trial court, and we cannot hold, in the circumstances of this case, that the court abused its discretion in admitting this evidence. Even if we were to so hold, we would be inclined to find that the admission of this evidence was harmless error, since the proof of Lentz' involvement in the wiretapping scheme was overwhelming.

The Indictment

[9–11] Lentz and Hullum argue that the indictment was multiplicious because in one count Hullum was charged with endeavoring to intercept a wire communication, aided and abetted by Lentz, while in another count Lentz was charged with the substantive offense, aided and abetted by Hullum. The jury convicted on both counts, but the government elected at sentencing to proceed on only one substantive count for each appellant, and each was sentenced to concurrent sentences on the conspiracy and on one substantive count. We believe that the indictment was probably multiplicious, since it charged the same offense in two different counts. *See Gerberding v. United States*, 471 F.2d 55 (8th Cir. 1973). Nevertheless, a conviction obtained pursuant to a multiplicious indictment does not have to be reversed in all cases, "since an indictment may charge a single crime in a variety of forms to avoid a fatal variance of the evidence." *United States v. Dudley*, 581 F.2d 1193, 1199 (5th Cir. 1978) (citing *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 225, 73 S.Ct. 227, 231, 97 L.Ed. 260 (1952)). If a multiplicious indictment leads to cumulative sentences, the appropriate remedy is to remand for dismissal of one count. *Dudley*, 581 F.2d at 1199. Since Lentz and Hullum each received only *one* sentence on a substantive count, there is no reason to upset the disposition made by the trial court. *See id.*

[12] Lentz and Hullum also contend that they were prejudiced by the government's being allowed to go to trial on the fourth count of the indictment. This count charged them with possession of wiretapping instruments and was dismissed at the close of the government's case. The trial court entered a judgment of acquittal on count four because the telephone lineman's handset used by Lentz was not shown to be an instrument of wiretapping designed for that use. The court then reformed the indictment to reflect the acquittal. We do not think that the defendants have shown that the government knew that count four was frivolous. Nor do we think that allowing the government to present evidence on all four counts was unfairly prejudicial to either defendant.

[13] Hullum contends that the indictment varied impermissibly from the proof offered at trial. Specifically, he points out that the indictment charges him with conspiracy and an attempt to tap the "telephone located at the residence of Patricia Maddox, Route 2, Box 72, Mormon Mill Road, Burnet County,

Texas," while the evidence at trial showed that Patricia Maddox did not live in the Mormon Mill residence at the time of the alleged offense, although she had lived there previously. However, the evidence also showed that Hullum believed that the house was occupied by Maddox. We believe that a variance does exist, although it is a technical one and not necessarily fatal to the prosecution. *See United States v. Baldarrama*, 566 F.2d 560 (5th Cir. 1978), *cert. denied*, 439 U.S. 844, 99 S.Ct. 140, 58 L.Ed.2d 145 (1979). Hullum is not entitled to a reversal of his conviction unless his substantial rights have been affected. *See United States v. Tilton*, 610 F.2d 302 (5th Cir. 1980). Since Hullum does not allege that any of his substantial rights were affected by this or argue that he was prejudiced in any way by the error in the indictment, we reject this contention as a ground for reversal.

Jury Charge on Intent

[14] Relying on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), Lentz and Hullum urge us to find error in the trial court's instruction on intent and on the inferences permissible from the evidence. The pertinent part of the court's charge is set out in the margin.[13] We think that it is a permissible charge under our case law and does not incorrectly shift the burden of proof to defendants. In fact, the trial court adopted language that we found commendable in *United States v. Chiantese*, 560 F.2d 1244, 1255 (5th Cir. 1977) (en banc). We do not read *Sandstrom* as forbidding this type of charge, since the charge at issue is couched in permissive, not mandatory, language.

Miscellaneous Assertions of Error

[15, 16] Lentz argues that the trial court should have severed his case from Hullum's and that its refusal to do so denied Lentz a fair trial. When defendants are properly joined in the indictment, the denial of a motion for severance is subject to reversal only for abuse of discretion. *United States v. Cuesta*, 597 F.2d 903 (5th Cir. 1979). Defendant Lentz must make a strong showing of prejudice arising from a joint trial in order to gain reversal, *see United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980) and he has not done so here. Lentz argues that his and Hullum's defenses were inconsistent, but in order to prevail Lentz had to show that "defenses . . . conflict[ed] to the point of being irreconcilable and mutually exclusive." *See United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). The fact that Lentz had a traditional entrapment defense, while Hullum did not, is not grounds for severance. *See United States v. Eastwood*, 489 F.2d 818, 822 (5th Cir. 1973). Having been shown no compelling prejudice by Lentz, we uphold the action of the trial court.

[17] Finally, Hullum charges the prosecution with two instances of misconduct. First, he alleges that the prosecution misled him by indicating in discovery that it

13. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

was capable of proving the essential elements of count four of the indictment, when that proved not to be the case at trial. We fail to see how Hullum was prejudiced by this action. We would point out that the government was required under the Jencks Act, 18 U.S.C. § 3500, to deliver the discovery materials to Hullum, and *failure* by the government to do so would have been error. Second, Hullum contends that the government obtained his stipulation to the testimony of one witness, who the government asserted would have testified concerning Hullum's bad character. At a post-trial hearing this witness stated that he was unaware of appellant's character in the community and that his testimony would have been based upon an acquaintance with Hullum 12 or 13 years prior to the events charged. Hullum contends that the government knew before trial that the witness' testimony would have been inadmissible and that his stipulation was obtained by deceit. Since the government presented four other witnesses who testified that appellant Hullum's reputation for truth and honesty and for being a law-abiding citizen was bad, and three additional witnesses were encompassed within the stipulation to that effect, we fail to see how this one stipulation prejudiced Hullum's rights.[14]

For all of the foregoing reasons, the convictions are

AFFIRMED.

14. Hullum presented six witnesses who testified to his good character.

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NO. 80-977

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

RAYMOND CLINTON HULLUM, JR.,
Petitioner

VS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF PER SC 22.6

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MEMBER: BAR OF U.S. SUPREME COURT

NO. 80-977

SUPREME COURT OF THE UNITED STATES

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RAYMOND CLINTON HULLUM, JR.,
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VS

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SUPPLEMENTAL BRIEF PER SC 22.6

TO THE HONORABLE COURT:

I.

In the recent case of U.S. vs SUTTON, No. 79-5681, 5th Circuit, Unit A (Cole C. Clark and Reavley) under date of Feb. 2, 1981 (see Appendix), the Fifth Circuit condemned the use of a Mann-type charge.

This is called to this Court's attention via a Supplement (SC Rule 22.6) because it adds fuel to the basis of jurisdiction and goes directly to the point set out in IX. SC Rule 21.1(j), B at page 21, et seq., of HULLUM's PETITION FOR WRIT OF CERTIORARI herein.

The charge given in SUTTON is herewith overlapped on the charge given in HULLUM:

> (SUTTON's charge is in parentheses in italics with the non-parenthetical portion being the same in both charges. Those portions of HULLUM's charge not in SUTTON are underlined.)
>
> > *(As a general rule,)* *(I)*t is reasonable to infer that a person ordinarily intends *(all)* the natural and probable consequences of <u>his knowing acts</u> *(acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion,)* *(T)*he jury may draw the inference that the accused intended all of the *(natural and probable)* consequences which one *(,)* standing in like circumstances *(,)* and possessing like knowledge should reasonably have expected to result from any <u>intentional act or conscious omission</u> *(act knowingly done or knowingly omitted by the accused)*. <u>Any such inference drawn is entitled to be considered by the jury in determining whether or not the Government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent</u>.

The Fifth Circuit in SUTTON condemned this charge and tested it by questioning its harm to SUTTON's case; then said:

> "We are constrained to hold, and do hold, that in this factual and legal context the

use of the Mann instruction was reversible error."

The Court noted that there was a serious question of SUTTON's intent in the conspiracy.

The Fifth Circuit in HULLUM approved this charge and did not test its harm to HULLUM where HULLUM's defense went directly to his intent.

The two cases are patently in direct conflict.

II.

In MANN 319 F(2) 404 (5th 1963), the offending words isolated by the Court were, *"So unless the contrary appears from the evidence..."*. In SUTTON the comparable words were, *"So, unless the evidence in the case leads the jury to a different or contrary conclusion..."*.

The comparable language in HULLUM is, *"...before convicting a defendant, the jury be satisfied from all the evidence in the case of the defendant's guilt beyond a reasonable doubt." (9/1135);* and *"Such intent may be determined from all of the facts and circumstances surrounding the case." (9/1138).*

Although these words were not in apposition to the charge on inference of intent which appears at 9/1137, yet the jury were told that the charge given them was the law of the case and they were "duty-bound" to follow it (9/1130); and further, they were thereafter instructed:

> "You are not to single out one instruction alone as stating the law; you must, rather consider the instruction as a whole." (emphasis added), at 9/1130.

which was in accord with CUPP 414 US 141 (1973) and contra to CHIANTESE 560 F(2) 1244 (5th 1977) which the lower Court followed in the case at bar.

THUS ANY DIFFERENCE URGED TO THE FACT THAT THE OFFENDING WORDS WERE NOT IN APPOSITION TO THE CHARGE OF INFERENCE OF INTENT IS RAPIDLY DISPELLED FOR THE INSTRUCTIONS MAKE ANY DIFFERENCE IN SYNTAX BETWEEN THE CHARGES IN MANN, SUTTON AND HULLUM A DISTINCTION WITHOUT ANY LEGAL MERIT WHATSOEVER.

And further, it is patent that no substantial difference in meaning obtains between the verbiage of the complained of offending language of MANN, of SUTTON and of HULLUM.

III.

SUTTON and SANDSTROM 442 US 510 (1979) and ULSTER COUNTY COURT 442 US 140 (1980) make it clear that the test of charges like the one at bar where the attack is a complaint of impermissible burden shifting is two-fold:

1. Could the charge have been read by a reasonable juror to shift the burden? SANDSTROM and ULSTER COUNTY COURT say this. So does TYLER 622 F(2) 1972 (5th 1980) and SUTTON.

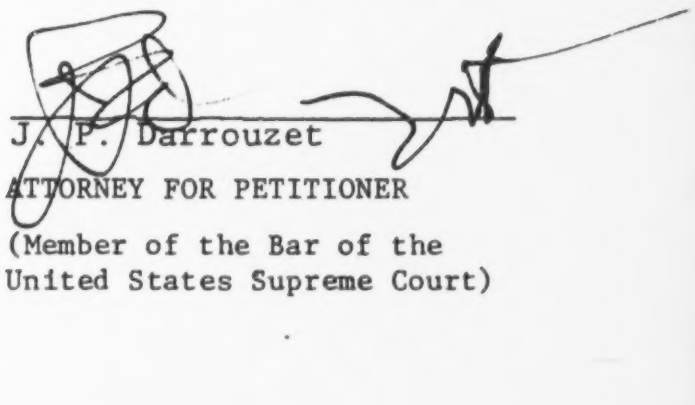
2. Does such a charge render harm to the defense? SANDSTROM and ULSTER COUNTY COURT say this. So does TYLER and SUTTON (as well as BAKER 619 F[2] 327 [4th 1980]).

The Court erred in HULLUM in failing to use either of these tests subscribed to by their own Circuit and this Court.

PRAYER

The prayer of HULLUM's Petition for Writ of Certiorari is respectfully renewed.

RESPECTFULLY SO PRAYED,



J. P. Darrouzet
ATTORNEY FOR PETITIONER
(Member of the Bar of the United States Supreme Court)

UNITED STATES of America,
Plaintiff-Appellee,

v.

John Ellis SUTTON,
Defendant-Appellant.

No. 79-5681.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 2, 1981.

Defendant was convicted in the United States District Court for the Southern District of Texas, George E. Cire, J., of conspiracy to dispense and distribute controlled substances and he appealed. The Court of Appeals, Coleman, Chief Judge, held that: (1) use of the Mann instruction was reversible error; (2) stop of automobile was a proper investigative stop based upon the reasonable suspicion that its occupants were engaged in criminal enterprise; (3) warrantless seizure and examination of contents of paper sack from pharmacy, lying in full view on front floorboard of automobile was not precluded by Fourth Amendment principles after valid stop of the automobile; and (4) search of briefcase taken from the automobile trunk was precluded by Fourth Amendment principles and the fruits of such search should have been suppressed.

Reversed and remanded.

1. Criminal Law ⇐778(6), 1172.2

In prosecution for conspiracy to dispense and distribute controlled substances, use of the Mann instruction, stating "it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted," was reversible error, in view of fact that proof of conspiracy was dependent upon inferences which jury might reasonably draw beyond a reasonable doubt from the recited occurrence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.C.A.Const. Amends. 4, 6.

2. Arrest ⇐63.5(6)

Police officer's stop of car was a proper investigative stop based upon the reasonable suspicion that the occupants were engaged in criminal enterprise, where he had prior knowledge of an investigation concerning the illicit activities of the husband of the woman to whom the car was registered and also had knowledge that another police officer had observed the occupants in pharmacy when one of them paid an inordinately high price for two prescriptions.

3. Searches and Seizures ⇐7(20)

Police officer's warrantless seizure and examination of contents of paper sack from pharmacy lying in full view on front floorboard of automobile was not precluded by Fourth Amendment principles, where the automobile had been properly stopped upon the reasonable suspicion that the occupants were engaged in criminal enterprise in connection with the payment of an inordinately high price for two prescriptions at the pharmacy. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐7(10)

Police officer's warrantless search of briefcase taken from automobile trunk after automobile had been properly stopped upon the reasonable suspicion that the occupants were engaged in crim-

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inal enterprise was precluded by Fourth Amendment principles, and the fruits of such search should have been suppressed. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, and CHARLES CLARK and REAVLEY, Circuit Judges.

COLEMAN, Chief Judge.

Defendant John Ellis Sutton was found guilty of conspiracy to dispense and distribute Schedule II controlled substances in violation of 21 U.S.C., Section 846.[1] Sutton's co-defendant, Johnny Lester Randolph, was also convicted of the same charge but abandoned his appeal in return for a plea bargaining agreement. Sutton challenges his conviction on the ground that the jury charge shifted the burden in violation of his Sixth Amendment rights. He also asserts that a warrantless search of a paper sack and a briefcase found in the automobile, which he was driving, violated his Fourth Amendment rights.

On August 1, 1978, Houston police officer A. D. Dugger, while off-duty, but who had previous knowledge of two affidavits concerning illicit activities of Fisher's Pharmacy and one Dr. Edwards, saw defendant Sutton and another man at the Fisher Pharmacy in Pasadena, Texas. Officer Dugger saw the other man, whom he did not recognize, purchase two prescriptions, one for $90.00 and one for $108.00. He saw Sutton, whom he recognized by sight but not by name, walk up to the counter when a name was called. The officer followed the other man outside and saw him get into a 1976 Cadillac with three other people. Thereafter, officer Dugger returned to his car, radioed for assistance and ran a license check on the Cadillac, *which was found to be registered to the wife of Dr. Edwards.*

In answer to officer Dugger's phone call, Lt. Sidney Smith of the Pasadena Police Department arrived on the scene and observed the Cadillac leaving the pharmacy. Sutton was driving. Lt. Smith followed the Cadillac and had it stopped by a marked patrol car. After all the occupants were out of the car and checked for identification, Lt. Smith saw a Fisher Pharmacy sack in plain view, lying on the front floorboard. The sack turned out to be filled with prescription bottles containing Dilaudid and Tuinal. Lt. Smith saw that the names on the prescription bottles were not those of the occupants of the car, whereupon he arrested them for possession of a controlled substance. Lt. Smith then opened the automobile trunk, found Sutton's briefcase, searched it, and found it to contain papers later designated as government's exhibits 9 and 10 at trial.[2]

The only other evidence offered by the government which might link Sutton to Dr. Edwards, or to co-defendant Johnny

1. Section 846 states:

   Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. The briefcase contained a list bearing the names of husbands, wives and their addresses in the Houston area and note paper containing mathematical computations. Danny Hines whose name and address were on the list testified at trial.

Randolph, or to the alleged conspiracy, was testimony from Edwards' secretary that a man who called himself "Sutton" telephoned the doctor's office several times, plus testimony from another Edwards employee that Sutton and Randolph once met at a downtown office.

The Mann Charge

At trial, in pertinent part, the jury was charged as follows:

> As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Sutton adopted Randolph's timely objection at trial, stating the grounds in accordance with the requirement of Federal Rule of Criminal Procedure 30.[3]

It has been repeatedly held that the *Mann* charge in effect may shift the burden of proof from the prosecution to the defendant. It was condemned by this Court as early as *Mann v. United States*, 319 F.2d 404 (5th Cir., 1963), *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964). Nevertheless, trial courts continued to give the charge, with the result that we recently traced the history and continued use of the *Mann* charge in this Circuit in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir., 1977) (en banc). In *Chiantese* the Court emphatically stated:

> No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence.

Id. at 1255.

Furthermore, it was declared that no longer would we absolve such errors by looking to the whole charge for corrective phrases.

This should have been a formidable warning to prosecutors to have no more to do with seeking and using the *Mann* charge.

The tone of the banishment was tempered, however, with the observation that the use of the charge would not trigger *automatic reversal*. It was said:

> We refuse to classify the giving of a charge in violation of paragraph 1, *whether objected to or not*, as the type of error which will automatically produce reversal. If, despite our action today, the error should recur, the weighing of its harm to the accused shall remain a judicial matter to be resolved in the context of each case where it occurs. Such weighing, however, shall not include consideration of

3. FRCP 30 reads in pertinent part:

> . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

> whether a defective charge has been cured by prior or subsequent statements. (Emphasis added).

Id. at 1255.

It would appear that what the Court really was saying is that it was well aware of the *harmless error rule* which applies to many situations in which there is non-compliance with Constitutional guidelines. Otherwise, it would make no sense to blister this instruction in no uncertain terms and in the same breath to say that if the charge is given the harm will be evaluated before there is a reversal. The *spur* is that in making such an evaluation no attention will be paid to curative language which may appear elsewhere in the instructions.

So the question remains: Did the *Mann* charge harm Sutton's defense could it have been read to impose a burden on him to establish his innocence?

The evidence established that Sutton was in the drugstore at a time when a companion paid an inordinately high price for two prescriptions; that he followed the companion to a Cadillac and thereafter took the wheel. The controlled substances were then found on the front floorboard of the car, in a sack which came from the pharmacy. Therefore, any conspiracy, with the intent to participate in dispensing and distributing controlled substances, depended on inferences which the jury might reasonably draw beyond a reasonable doubt from the recited occurrence.

[1] We are constrained to hold, and do hold, that in *this* factual and legal context the use of the *Mann* instruction was reversible error. There was association but with no spoken proof of an agreement; Sutton was driving a car, also occupied by others, in which contraband was found. That contraband had been acquired in Sutton's presence. The proof was sufficient to go to the jury, but it should have gone there without the burden of the *Mann* charge.

The Search

Sutton moved to suppress the evidence and the testimony growing out of the warrantless search of the Cadillac he was driving on August 1, 1978. The motion was denied and the contents of the paper sack, found on the front floorboard, and the contents of the briefcase, found in the trunk, as well as the testimony derived therefrom, were admitted in evidence.

The Stop

[2] The stop of the Cadillac was a proper investigative stop based upon the reasonable suspicion that the occupants were engaged in criminal enterprise, *United States v. Allison*, 616 F.2d 779 (5th Cir., 1980). Lt. Smith's prior knowledge of the Edwards investigation and knowledge of Officer Dugger's observations in the pharmacy were enough to constitute "reasonable suspicion". In *Allison, supra*, we said:

> A police officer may make an investigative stop of an individual if he reasonably suspects that the individual is involved in criminal activity. Probable cause is not required to justify an investigative stop; reasonable suspicion is sufficient. [Citing] *United States v. Hall*, 557 F.2d 1114, 1116 (5th Cir., 1977). Nor was the stop unreasonable simply because [the officer] acted on

hearsay knowledge. Reasonable suspicion may exist on the collective knowledge of the police when there is reliable communication between the officer supplying the information and the officer acting on that information. [Citations omitted].

The Sack

The search of the paper sack is a different question. The Supreme Court has generally recognized an "automobile exception" to the requirement that police secure a warrant before conducting a search. See, e. g., *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This principle has been limited, see *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). In *Sanders* the Court disapproved a warrantless search of luggage taken from the trunk of an automobile that had been lawfully stopped. The Court, stressing expectation of privacy, reasoned that the mere fact that personal luggage is taken from an automobile does not demonstrate the necessity of a warrantless search. "[T]he reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles", *Sanders*, 442 U.S. at 765, 99 S.Ct. at 2593 94. However, the Court in footnote 13 stated:

> Not all containers and packeges found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view" thereby obviating the need for a warrant.

Id. at 764 n. 13, 99 S.Ct. at 2593, n. 13.

In a recent case, *United States v. Rigales*, 630 F.2d 364 (5th Cir., 1980), this Court held that the search of a zippered case found in plain view on the floorboard of a lawfully stopped automobile was improper, citing *Sanders*. However, this decision rested on the premise that "[n]othing in the trial transcript demonstrates that the zippered case was anything other than an ordinary briefcase that was simply heavy and bulging".

[3] In the instant case the paper sack was obviously from Fisher's Pharmacy [4] and its contents could be inferred from the first hand knowledge that it had been brought directly from the pharmacy under unusual circumstances, *Sanders*, 442 U.S. at 764, n. 13, 99 S.Ct. at 2593, n. 13. Accordingly, we hold that the warrantless seizure and examination of the contents of this paper sack, lying with a corresponding indifference toward any expectation of privacy, in full view on the

4. On direct examination, Lt. Smith testified as follows:

> Q. [Government Attorney]: Then what did you do?
> A. Then I looked inside the car and I saw a sack lying on the floorboard, the front seat.
> Q. Okay.
> A. And I looked inside the sack and I found a number of prescription bottles filled with Dilaudid and one with Tuinal and I noticed
> . . .
> Q. Would that sack have any inscription on it as coming from a pharmacy?
> A. Fisher Pharmacy, yes, sir.

front floorboard of the automobile was not precluded by Fourth Amendment principles.

The Briefcase

[4] *Sanders* dictates a contrary result as to the briefcase taken from the automobile trunk. The government argued the presence of exigent circumstances[5] but this is without support in the record. The contents of the briefcase located in the trunk, searched without a warrant, and the fruits of that search should have been suppressed.

REVERSED and REMANDED.

5. The Supreme Court in *Sanders* stated that "[t]here may be cases in which the special exigencies of the situation would justify the warrantless search of the suitcase. [Citations omitted]. Generally, however, such exigencies will depend upon probable contents of the luggage and the suspect's access to those contents not upon whether the luggage is taken from an automobile". 442 U.S. at 763, 99 S.Ct. at 2593, n. 11.

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